

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 18 October 2006

CASE NO. 2005-LHC-01514

In the Matter of:

M.F.

Claimant

v.

Newport News Shipbuilding and Dry Dock Company
Employer

Appearances:

Lorraine D'Angelo, Esq.
For the Claimant

Jonathan Walker, Esp.
For the Employer/Carrier

Before: LARRY W. PRICE
Administrative Law Judge

DECISION AND ORDER DENYING SECTION 22 MODIFICATION

This is a claim for a modification of benefits awarded under the Longshore and Harbor Workers' Compensation Act (hereinafter the Act), 33 U.S.C. § 901 et. seq., to M.F. (Claimant) against Newport News Shipbuilding and Dry Dock Company (Employer). Claimant sought temporary partial disability compensation as the result of a work related injury that occurred March 9, 1988. On October 17, 1991, Judge Richard K. Malamphy issued a Decision and Order, awarding Claimant temporary partial disability benefits based on a loss in wage-earning capacity. Judge Fletcher Campbell Jr. later determined that Claimant should receive permanent partial disability benefits in a Decision and Order dated February 24, 1998. The parties had stipulated that Claimant reached maximum medical improvement on or about October 5, 1993. Employer was ordered to pay Claimant permanent partial disability compensation at the rate of \$254.55 per week from October 5, 1993 until November 4, 1996, at which point Claimant's

compensation was to be reduced to the rate of \$216.67 per week.¹ Employer seeks modification under Section 22 of the Act based on an increase in Claimant's wage earning capacity.

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. A formal hearing was held on March 14, 2006 in Newport News, Virginia. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs.² The following exhibits are admitted into evidence:

1. Employer's Exhibit (EX): 1 – 17;
2. Claimant's Exhibit (CX): 1 – 13.

Based on the evidence introduced and the arguments presented, I find as follows:

I. ISSUE

The unresolved issue in this proceeding is:

1. Whether there is a change in Claimant's economic condition to justify modification of the prior award

II. SUMMARY OF THE EVIDENCE

Claimant's Testimony

Claimant is married and lives with his wife, W.F., and mother in Poquoson, Virginia. (Tr. 14). Claimant has a tenth grade education, and did not get a General Education Degree (GED). (Tr. 25). While an employee at Newport News Shipbuilding Co., he sustained injuries on two different occasions. In 1984 he hurt his right leg, neck, shoulder and upper extremities. (Tr. 14-15). In 1988, he injured his neck and shoulder. He stopped working for Employer in 1988. (Tr. 15). Currently Claimant and his wife own a truck driving business. (Tr. 16).

Following Claimant's employment with Employer, he worked as a waterman with his father, then did locksmith work and eventually began driving a truck in 2001 (Tr. 15).

¹ In the Decision and Order issued on Feb. 24, 1998, Judge Campbell ordered Employer to pay Claimant permanent partial disability compensation at the rate of \$254.55 per week from October 5, 1993, until November 4, 1996 at which point Claimant's compensation was to be reduced by the amount of \$134.00 per week from November 4, 1996 to the present and upon expiration of the 104 week period following October 5, 1993, such compensation and adjustments were to be paid by the Special Fund at the rate of \$438.00 per week. In Errata order dated April 20, 1998, Judge Campbell changed the amount to be paid to the Claimant beginning on November 4, 1996 to \$216.67 per week. The District Director appealed the case to the Benefits Review Board, which ruled that Employer wasn't entitled to Special Fund relief under the Act at 33 U.S.C. 908(f) because Employer failed to file for this relief at the OWCP level. M.F. v. Newport News Shipbuilding & Dry Dock Co., 33 BRBS 75, BRB No. 98-1172 (May 26, 1999).

² I held the record open for thirty days post-hearing for the Employer to submit the deposition of their vocational expert and to allow all parties to submit briefs. The Claimant submitted a brief on July 27, 2006. The Employer submitted a brief on August 11, 2006. The deposition of the Employer's vocational expert is admitted as Employer's Exhibit 17.

Claimant contemplated purchasing his own truck in order to have greater control over his hours (Tr. 17). His wife agreed to provide assistance with the truck driving business. Claimant entered into an annual contract with Givens and was then able to secure a loan in order to purchase the truck. (Tr. 18).³

Typically Claimant and his wife drive their truck to North Carolina, South Carolina and within Virginia. They have done longer cross-country travel in the past, but Claimant testified that his health has impeded their ability to drive long distances. (Tr. 22). The average trip is three to four days, during which Claimant and his wife sleep on two beds located on the sleeping berth in the truck. (Tr. 22). Claimant testified that he drives a maximum of five or six hours a day with intermittent breaks. (Tr. 22). Usually Claimant would drive for approximately two and a half hours and then stop to rest. (Tr. 23). Many regional trips to North Carolina and South Carolina require more than ten hours of driving per day; driving records submitted by the Claimant as CX 4 and CX 5 show that the wife does the majority of driving for these trips.

In April 2005, the contract with Givens was transferred to his wife's name because Claimant's deteriorating health required his wife to do most of the work by herself. (Tr. 19). Claimant's wife took complete control over the business when Claimant was doing poorly. (Tr. 19). Claimant testified that Dr. Baddar had placed restrictions on his daily activities. According to the Claimant, he is not supposed to walk very far, stand or sit for long periods of time or lift more than 10 pounds. (Tr. 23). Claimant believes he is still able to do his job despite these restrictions, so long as his wife provides assistance. "I mean, some days I am not able to drive at all. She drives that whole complete day..." (Tr. 24). Claimant's wife does everything that Claimant is unable to do. (Tr. 24).

Since Claimant started driving a truck, he has had problems with his blood sugar. In 1999, he lost over 60 pounds and had to change his diet because his blood sugar levels were elevated. (Tr. 37). In 2001, Claimant was diagnosed as diabetic, and had to monitor his diet and blood sugar levels. (CX 12 at 15). Claimant admitted truck driving made it difficult to maintain a healthy diet. (Tr. 38). No formal work restrictions were filed in relation to diabetes. However, Claimant testified that even though his blood sugar levels are fluctuating, his doctors continue to prescribe pills to treat his diabetes because he would lose his license once he is placed on insulin.

Claimant testified that he is not currently making any money, because any profit goes toward repaying the loan on the truck. Claimant is paying approximately \$1400.00 a month. Despite the lack of profit, Claimant testified that he enjoys the work. (Tr. 42).

Testimony of W.F.

W. F. is currently married to and living with Claimant. W.F. drives a truck along with her husband. She has been a truck driver for eight years. She drove a dump truck for the first three years, and has driven tractor trailers with a commercial driver's license since then. (Tr. 45,

³ Although Claimant originally intended to include his wife's name on the contract, a contact at Givens explained that typically these contracts only include one driver per truck, regardless of the number of individuals that actually drive (Tr. 19).

Tr. 16). She and her husband are currently repaying a loan on a truck and expect to be owners in November 2006. (Tr. 70).

W.F. testified that with regard to the truck driving business, she does all the record-keeping, the majority of the driving and most of the labor. W.F. testified that she keeps all records for herself and the Claimant. (Tr. 45). She identified the logbooks and explained the documentation process. Travel for each day had to be recorded and logbooks had to be kept for eight days pursuant to Federal Law. (Tr. 49, 54).

W.F. stated that she always accompanies her husband on trips; however she sometimes goes on trips without her husband. (Tr. 51). During these times her husband is not medically able to drive along with her. When they do drive the truck together, she does the majority of the labor. (Tr. 51). W.F. also testified that she and Claimant are truck driving together because "if my husband stayed at home, he would be dead right now... We enjoy being together, and if it wasn't for me, he would not be doing this." (Tr. 74-75).

Summary of Medical Evidence

Medical Records of Dr. Lawrence Morales

According to the medical records, Dr. Morales treated Claimant from January 6, 1999 to August 1, 2005. Claimant would see Dr. Morales approximately once every three to four months, although the time between visits did sometimes vary from one to nine months.

From the start of treatment with Dr. Morales, the Claimant complained of intermittent pain in the right shoulder that was bothersome while sleeping and during overhead activity. There was mild Crepitus at midrange, some discomfort and Crepitus with internal and external rotation. Claimant had full range of motion for his elbow and hand. Dr. Morales stated that Claimant was, at that time, able to perform duties associated with the locksmith job. (CX 1 at 1). Claimant soon thereafter began complaining of pain radiating into the lateral arm and neck. (CX1 at 4-5). On 6/8/00, Dr. Morales reported that the x-rays revealed calcification at the insertion of the rotator cuff and a small spur over the tip of the acromion superiorly. (CX 1 at 7). A month later, complainant reported having difficulty in filling his duties as a locksmith because certain positions made him sore and achy and on occasion caused pain.

Throughout their treatment relationship, pain and soreness around the shoulder and neck seemed to be persistent. The claimant started to lose range of motion of the cervical spine. (CX 1 at 14). On October 31, 2003, Dr. Morales reported that the worsening pain impaired claimant's ability to drive. (CX 1 at 16). At that time, complainant started to complain of numbness and tingling in the right arm, as well as weakness in his hands. X-rays showed post traumatic changes of the right shoulder. Radiating pain started to cause headaches, and claimant's range of motion in the cervical spine decreased by 15-20%, and range of motion in the shoulder decreased by approximately 10-15%. (CX 1 at 18). In time Dr. Morales reported tight myofascia and spasm over the right posterior neck. (CX 1 at 19). By March, 2005, Claimant complained of severe pain and also weakness. Patient's range of motion in the cervical spine had deteriorated to 30-40%. (CX 1 at 24).

On March 31, 2005, Dr. Morales received the results from an MRI taken of Claimant's cervical spine. Based upon the results of this MRI, the reported pain in the right shoulder and neck, and Claimant's diagnosis of diabetes, Dr. Morales opined that it is unlikely that the patient will continue to work. (CX 1 at 26). Dr. Morales further clarified this opinion by stating that he thought claimant unable to work because of "neck and shoulder along with other medical and orthopedic problems". (CX 1 at 27).

Medical Records from Suburban Family Practice

Suburban Family Practice Medical Clinic has medical records on file for the Claimant beginning in 1993. These records show that Claimant has had chronic sinusitis, bronchitis, diabetes and Carpal Tunnel Syndrome (CTS). Due to the CTS, Claimant had to purchase wrist splints in May, 1997. (CX 12 at 30). His position as a waterman aggravated the CTS. (CX 12 at 17). Later that month, Claimant complained of lower back pain. Dr. Provenzano reported "sensory is decreased, grip strength is decreased in both hands" and prescribed Lodine and Vicodine. (CX 12 at 16). Claimant's wrist pain continued throughout the year. (CX 12 at 16).

Within the following two years, Claimant lost 60 pounds by changing his diet in order to control his blood sugar. He had quit his job as a waterman and began working as a locksmith. (CX 12 at 15). In October 1999, Claimant visited Dr. Provenzano complaining of numbness and tingling in his hands and feet, which Dr. Provenzano attributed to obesity, elevated blood sugar and peripheral neuropathy. (CX 12 at 15).

In July 2001, Claimant was diagnosed with Type II diabetes. (CX 12 at 15). Claimant's diabetes has progressed over the years. He has had swelling in the feet and legs as well as ulcers in his feet. (CX 12 at 1-2, 4-5, 8-10, 25-26). In August 2003, Dr. Caratachea treated an ulcer on Claimant's foot. She diagnosed type II diabetes and further explained that the ulcer may have occurred because "he is a truck driver and has his legs in a downward position most of the time." (CX 12 at 10).

Within the last two years, Claimant has been treated for chronic headaches, diabetes and depression. A CT scan in February 2005, revealed a possible meningioma and an MRI scan with enhancement was advised. (CX 12 at 34). In November 2005, Claimant visited the Suburban Family Practice complaining of muscle weakness, stiffness and chronic shoulder pain. Claimant was concerned with his chronic headaches and severe fatigue. Dr. Caratachea attributed many of the symptoms to uncontrolled type II diabetes and prescribed Glucophage. (CX 12 at 05).

Medical Restrictions and Report from Dr. Baddar

Dr. Baddar placed restrictions on Claimant on February 2, 2006. Claimant was advised not to climb vertical or inclined ladders, lift more than ten pounds, carry objects for more than one hundred feet, or work above the shoulders. (CX 13). Dr. Baddar completed a medical report on February 23, 2006. This report was derived from his examination of the Claimant, Claimant's social history, medical history, letters from Dr. Ross and x-rays of Claimant's right shoulder and

cervical spine from 2005. (CX 16 at 1-2). Dr. Baddar reported that Claimant's exam findings would lead to the conclusion that Claimant has some shoulder pathology. However Claimant's poor response to injections and negative MRI caused Dr. Baddar to reject this diagnosis. Dr. Baddar recommended further testing in order to evaluate Claimant's nervous system in order to determine the cause of Claimant's numbness and tingling. (CX 16 at 2).

Medical Report from Dr. Mark A Ross

At Employer's request, Dr. Ross to complete a medical evaluation and report of Claimant's medical condition. Dr. Ross has not provided any medical care for the Claimant, although he did meet with Claimant on September 19, 2005. He prepared a report based upon examination of Claimant, past medical, family and social history, including 45 x-rays, an MRI scan of the shoulder and cervical spine, Dr. Morales' office notes and a history of injections. (CX 11 at 5). Dr. Ross noted that Claimant walks on crutches due to wounds on the lower extremities. (CX 11 at 4).

Dr. Ross reported that Claimant was experiencing neck and shoulder pain, but that Claimant was medically stable relative to any issue with his neck or shoulder. He did not believe Claimant to be medically stable with regard to his diagnosis of diabetes mellitus. Dr. Ross stated that Claimant had been working for years, that it is unclear how many hours a week Claimant actually works, and that any difficulty with work is largely attributed to medical conditions unrelated to Claimant's work related injuries. (CX 11 at 6). Dr. Ross cannot relate any shoulder or neck problems to the injuries sustained at the shipyard, although he does feel that Claimant's diabetes will worsen and cause Claimant further difficulties. Dr. Baddar concluded that at the time of the medical report, Claimant was able to work in a light to medium physical demand level, so long as Claimant refrained from frequently lifting the right upper extremity above the shoulder. (CX 11 at 7).

Summary of Vocational Evidence

Labor Market Survey, October 20th, 2005 and Deposition of Rebecca Seaford

Employer introduced vocational evidence to establish suitable alternative employment. On October 20, 2005, Ms. Seaford, a vocational consultant, completed a labor market survey at the request of Employer (EX 2). Rebecca Seaford has six years experience as a vocational counselor. She is a Certified Rehabilitation Provider for the State of Virginia and is a Certified Disabilities Management Specialist, which is a national certification. (EX 17 at 4). Ms. Seaford routinely provides assistance to individuals seeking employment or trying to determine what employment they are capable of performing. (EX 17 at 4).

The labor market survey indicated Claimant's wage earning capacity and provided alternative employment opportunities that Claimant would be capable of performing based upon his education, skills, and past work history. (EX 17 at 5). Ms. Seaford made two attempts to meet with Claimant in order to obtain more details regarding his previous work experience and

background.⁴ (EX 17 at 6). Claimant declined the first offer, and failed to respond to the second offer. As a result Ms. Seaford never met with Claimant.⁵ (EX 17 at 6).

In order to assess Claimant's transferable skills, Ms. Seaford used Claimant's job application and personnel records from Employer to obtain a history of Claimant's previous work duties and educational background. (EX 17 at 6). Ms. Seaford incorrectly concluded that Claimant had received a high school diploma. (EX 2 at 3). Claimant's physical work restrictions were also used in the analysis. These restrictions were imposed by two of Claimant's physicians, Dr. Morales and Dr. Ross. (EX 2 at 2). Dr. Morales suggested, on March 17, 2005, Claimant avoid overhead activities and any heavy lifting or stooping, while six months later Dr. Ross advised Claimant refrain from lifting his right upper extremity above shoulder height. (EX 2 at 2). Ms. Seaford determined that these medical restrictions correspond with a Medium work level, as defined in the Dictionary of Occupational Titles, as "exerting 20 to 50 pounds of force occasionally, or 10-25 pounds of force frequently, or greater than negligible up to 10 pounds of force constantly to move objects."⁶ (EX 2 at 2).

Within these parameters, Ms. Seaford identified thirteen positions in the Hampton Roads Area that were compatible with Claimant's skills and physical capacity. (EX 2 at 3). Ms. Seaford contacted each employer to verify the availability of these positions. Unless specified below, the employer was continuously hiring for the jobs suggested in the labor market survey. For each employment opportunity, Ms. Seaford identified the weekly average wage, necessary qualifications, duties and physical demands. (EX 2 at 4-10). The labor market survey categorized the thirteen positions into four occupational groups. These four groups were Tractor-Trailer-Truck Driver, Owner-Operator; Tractor-Trailer-Truck Driver, Company Vehicle; Yard Jockey/ Hostler; and Route Sales Driver. (EX 2 at 3).

The job descriptions were delivered to Claimant's treating physicians, Dr. Morales and Dr. Baddar, as well as one examining physician, Dr. Ross. (EX 17 at 15). Dr. Morales and Dr. Baddar approved all thirteen positions as compliant with Claimant's work restrictions. Dr. Ross, the examining physician, approved only six of the thirteen positions.⁷ (EX 17 at 15).

All occupational groups require a Class A Commercial Driver's License (CDL) except the Route Sales Driver positions.⁸ The physical demands associated with every position include driving, standing, walking, climbing in and out of the truck, occasional bending or stooping, and reaching, occasionally overhead to gain access to truck controls. The majority of employers listed in the job market survey hire continuously, however a few only hired occasionally during

⁴ Claimant's attorney sent a letter in response to Ms. Seaford's first attempt, stating that "the Longshore Act does not require cooperation with vocation rehabilitation and it is our position that [Claimant] is currently unable to work". (EX 17 at 5). This letter has been admitted into evidence. (EX 3).

⁵ In her deposition, Ms. Seaford identified the Market Survey and opined that it is still valid despite her failure to meet with the Claimant. (EX 17 at 17).

⁶ Ms. Seaford also used OASYS, O*NET, Occupational Outlook Handbook 2004-2005, and the revised Handbook for analyzing jobs in order to complete the labor market survey. (EX 2).

⁷ There is a discrepancy in Ms. Seaford's testimony regarding the number of positions Dr. Ross approved. First Ms. Seaford claims that Dr. Ross approved six positions, but then she testified that Dr. Ross approved of all the operator/owner and company vehicle truck driving positions, which includes eight jobs. (EX 17 at 15).

⁸ A Class A CDL with HM endorsements signifies accreditation for handling hazardous materials.

the course of a year. Ms. Seaford called and validated the availability of each job; each position was available at some point since 1998 and was open in either September or October of 2005. (EX 2 at 8-10). The following chart summarizes the additional characteristics of each position listed in the job market survey.⁹ (EX 2).

Employer	Occupational Group	Position	FT/PT	Weekly Average Salary	Qualifications	Duties	Physical Demands	Physician Approval
Rush Trucking	Tractor-Trailer-Truck Driver, Owner-Operator	Driver, Owner-Operator	Full time	\$2403.85	Minimum age of 23, DOT requirements, 2 years experience, vehicle > 7 years then must pass inspection	Drive regionally/ OTR, No touch loads	No additional physical Demands	Approved by Dr. Morales, Dr. Baddar and Dr. Ross
Swift Transportation Inc.	Tractor-Trailer-Truck Driver, Owner-Operator	Driver, Owner-Operator	Full time	\$2125.00	Clean driving record, DOT physical, 8 months experience, vehicle = 3 axle sleeper, 1998 or newer, clean appearance, pass drug test	Drive regionally/ OTR, 98% No Touch	No additional physical demands	Approved by Dr. Morales, Dr. Baddar and Dr. Ross
U.S. Express	Tractor-Trailer-Truck Driver, Owner-Operator	Driver, Owner-Operator	Full time	\$2750.00	6 months experience in 5 states, good driving record	Drive regionally/ OTR, 98% No touch	No additional physical demands	Approved by Dr. Morales, Dr. Baddar and Dr. Ross
G & P Trucking Company	Tractor-Trailer-Truck Driver, Owner-Operator	Driver, Owner-Operator	Full time	\$2700.00	Class A CDL with HM endorsements, 21 years minimum age, 1 year experience, clean driving record, no criminal convictions, no dishonorable discharge from military, pass drug test	Drive regionally/ OTR, some No touch loads available	Lifting depending on product, Medium physical demand	Approved by Dr. Morales, Dr. Baddar and Dr. Ross
J.B. Hunt	Tractor-Trailer-Truck Driver, Owner-Operator	Driver, Owner-Operator	Full time	\$2875.00	6 months experience, DOT physical, Vehicle less than 7 years old and meets DOT requirements	Drive regionally/ OTR, 98% No Touch	No additional physical demands	Approved by Dr. Morales, Dr. Baddar and Dr. Ross

⁹ The following terms are used in this chart: Over-the-Road (OTR) driving and “No Touch” loads. Regional/ over-the-road driving was defined by Ms. Seaford as driving interstate, rather than local or intrastate driving. (EX 17.08). “No touch loads” are shipments that are loaded and unloaded using a forklift and requires no lifting from the driver. (EX 17 at 11).

<u>Employer</u>	<u>Occupational Group</u>	<u>Position</u>	<u>FT/PT</u>	<u>Average Weekly Salary</u>	<u>Qualifications</u>	<u>Duties</u>	<u>Physical demands</u>	<u>Physician Approval</u>
Allied Trailers	Tractor-Trailer-Truck Driver, Company Vehicle	Truck Driver	Full Time	\$560.00 plus commission	Good Driving Record	Drive Regionally, Day trips, deliver storage vans, containers and trailers. Use hand controls to drop container. Occasional loading and unloading, Lift 15 lb. cinderblock to block truck.	Occasional lifting of 15 lb. blocks	Approved by Dr. Morales, Dr. Baddar and Dr. Ross
Neff Rentals	Tractor-Trailer-Truck Driver, Company Vehicle	Truck Driver	Full Time	\$500.00 - \$640.00	Good Driving Record	Drive locally and or regionally, deliver heavy equipment to work sites, unload trailers by driving equipment off trailer	Occasional lifting 15 lb. blocks	Approved by Dr. Morales, Dr. Baddar and Dr. Ross
J.B. Hunt	Tractor-Trailer-Truck Driver, Company Vehicle	Truck Driver	Full Time	\$900.00 week for first two months, \$930.00 thereafter	6 months experience, and pass DOT physical	Drive regionally/OTR, 98% No Touch loads	No additional physical demands	Approved by Dr. Morales, Dr. Baddar and Dr. Ross
Dollar Tree Stores	Yard Jockey/Hostler	Yard Driver	Full Time	\$460.00	High School Diploma/ GED, DOT qualified, ability to back 48' and 53' trailers, good driving record	Move trailers in and out of doors at docking center, deposit in yard. Transport trailers between off-site locations, use fork lift to load and unload trailers	Rare lifting of 50 pounds	Approved by Dr Morales and Dr. Baddar; NOT approved by Dr. Ross
QVC	Yard Jockey/Hostler	Yard Jockey	20-40 hours	\$283.40 - \$565.60	High School Diploma/ GED, read/ write and follow directions, Good driving record, 2 years experience, DOT qualified and pass drug test	Move trailers, do necessary paperwork and data entry, be cognizant of weather and traffic conditions, ability to use two-way radio, telephone and e-mail. Must be bondable and work independently	Occasional lifting; must be able to lift up to 50 pounds. Climbing and reaching to wash tractor	Approved by Dr Morales and Dr. Baddar; NOT approved by Dr. Ross

<u>Employer</u>	<u>Occupational Group</u>	<u>Position</u>	<u>FT/PT</u>	<u>Average Weekly Salary</u>	<u>Qualifications</u>	<u>Duties</u>	<u>Physical demands</u>	<u>Physician Approval</u>
Marva Maid	Route Sales Driver	Route Sales Driver	Full Time	\$378.00	High School Diploma/ GED, Class A or B CDL, knowledge of DOT regulations, ability to work independently and follow oral and written instructions, ability to use calculator	Delivery, rotation, stocking, pricing and cleanliness of dairy products; Provide customer service; May load truck; remove damaged products from displays and maintain vehicle inspection reports	Lift maximum of 50 pounds, frequently lift 25 pounds; push hand trucks	Approved by Dr Morales and Dr. Baddar; NOT approved by Dr. Ross
Mama Kayers Bakery	Route Sales Driver	Route Sales Driver	Full Time	\$538.46- \$615.38	High School Diploma/ GED, good customer skills	Deliver bakery items to stores along route, load own trucks, provide customer service to accounts	Lift maximum of 30 pounds, Push hand truck, but can modify weight as needed	Approved by Dr Morales and Dr. Baddar; NOT approved by Dr. Ross
Schwan's Home Services, Inc.	Route Sales Driver	Route Manager	Full Time	\$853.85 \$650.00 (training)	High School Diploma/ GED, good driving record, clean criminal record, follow DOT regulations, communication and customer service skills; Minimum 21 years of age	Drive medium size freezer truck; sell frozen food to residential customers and small businesses; provide customer service; secure new accounts; 70 – 100 customers a day	Lift maximum of 50 pounds	Approved by Dr Morales and Dr. Baddar; NOT approved by Dr. Ross

Testimony and Vocational Rehabilitation Report by Charles DeMark

In response to the October 2005 labor market survey Claimant introduced vocational evidence to establish Claimant's wage earning capacity. Francis Charles DeMark Jr., a Certified Rehabilitation Counselor, met with Claimant for a vocational evaluation on February 10, 2006. (CX 10 at 01). Mr. DeMark also met with Claimant's wife and had a telephone conversation with Dr. Sautter.

Charles DeMark graduated from Virginia Commonwealth University in 1982, and has been a rehabilitation counselor for 24 years. (Tr. 77). In order to complete a vocational report, Mr. DeMark reviewed Claimant's school records, medical records, reports of the two work related injuries, and administered a battery of vocational tests. (Tr. 78, CX 10 at 2-3). These various vocational tests measured Claimant's reading, spelling and math skills, general intelligence and manual dexterity. The results indicated that Claimant was reading at a 4.5 grade level, spelling at a 2.6 grade level and doing math at a 5.7 grade level. (Tr. 78). Claimant placed below the one percentile mark on the Perdue Pegboard Test, which measures manual dexterity. Claimant scored a 91 on an IQ test, which is within average range. (Tr. 78). Mr. DeMark

reported that Claimant's school records show that he had remained in high school until the 10th grade. (Tr. 78).

Mr. DeMark testified that he had worked with numerous individuals that were either being trained to be truck-drivers or suffered an injury during the course of their employment as truck-drivers. Typically this training involves referral to community college. (Tr. 80). Furthermore, Mr. DeMark stated that the medical restrictions imposed upon Claimant would be contraindicated for work as a truck driver.¹⁰ More specifically, limitations on lifting and overhead reaching would make it difficult for a truck driver to pull himself in and out of the cab and trailer and impede the ability to tie down equipment. (Tr. 83). Mr. DeMark concluded that Claimant could not "go out and get a job... as a tractor/trailer driver on his own, by himself". (Tr. 81).

In the vocational rehabilitation report, Mr. DeMark concluded that Claimant is unable to work independently and would not be able to participate in the business at all without his self-motivation, increased effort and the help of his wife. (CX 10 at 3). Mr. DeMark stated that purchasing a tractor to haul goods was not an advisory course of action for Claimant because such a venture yields a high risk of failure, Claimant is unable to sit for long periods of time due to swelling and Claimant is also unable to climb or lift heavy objects. (CX 10 at 3). This vocational report stated that without his wife, Claimant's truck driving business would be over. (CX 10 at 2). Mr. DeMark also disagreed with the job descriptions listed in the 2005 job market survey because the "United States Department of Labor classifies tractor trailer driving as medium work, which requires up to fifty pounds lifting, which is clearly outside [Claimant's] restrictions". (CX 10 at 2).

Mr. DeMark determined that Claimant's wage earning capacity is zero. (CX 10 at 3). Based upon the vocational evaluation, Mr. DeMark has concluded that Claimant is not capable of full time or even part time work due to his physical disabilities. The vocational report stated that Claimant has "suffered a diminution of his capacity to labor"; he is no longer able to compete in the job market like he had prior to the two work related injuries and these difficulties stem directly from the accidents in the shipyard and will continue for the rest of Claimant's life. (CX 10 at 3-4). Mr. DeMark attributes Claimant's inability to find employment compatible with his physical restrictions primarily to limited educational skills. Mr. DeMark testified that Claimant's "educational skills... combine in such a way that, in my opinion, he is not able to work." (Tr 80).

IV. DISCUSSION

In arriving at a decision in this matter, it is well-settled that the fact-finder is entitled to determine the credibility of the witnesses, weigh the evidence and draw his own inferences from it and is not bound to accept the opinion or theory of any particular medical examiner. Todd Shipyards v. Donovan, 200 F.2d 741 (5th Cir. 1962); Banks v. Chicago Grain Trimmers Ass'n, Inc., 390 U.S. 459, 467 reh'g denied, 391 U.S. 928 (1968). It has been consistently held that the

¹⁰ Mr. DeMark is referring to the restrictions placed on Claimant by Dr. Morales shortly after declaring that Claimant had reached maximum medical improvement in 1990. (Tr. 83 – 84).

Act must be construed liberally in favor of the claimants. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the “true-doubt” rule, which resolves factual doubt in favor of the claimant when evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. §556(d).

MODIFICATION OF PREVIOUS DECISION AND ORDERS

Section 22 of the Act states that any party-in-interest may, within one year of the last payment of compensation or rejection of a claim, request modification of a compensation award for mistake of fact or change in condition. 33 U.S.C. 922. The reference to a “change in condition” encompasses changes in a claimant’s physical condition as well as changes in economic condition. Metropolitan Stevedore Co. v. Rambo (Rambo I), 515 U.S. 291 (1995). Thus, an employer may show that an award of benefits should be reduced because suitable alternative employment has become available to a claimant who was previously found to be unemployable. Blake v. Ceres, Inc., 19 BRBS 219 (1987).

Where a party seeks modification based on a change in condition, an initial determination must be made as to whether the petitioning party has met the threshold requirement by offering evidence demonstrating that there has been a change in the claimant's condition. Jensen v. Weeks Marine, Inc. (Jensen II), 34 BRBS 147 (2000), decision and order on remand at 35 BRBS 174 (2001). This initial inquiry does not involve a weighing of the relevant evidence of record, but rather is limited to a consideration of whether the newly submitted evidence is sufficient to bring the claim within the scope of Section 22. If so, the Court must determine whether modification is warranted by considering all of the relevant evidence of record to discern whether there was, in fact, a change in the claimant's physical or economic condition from the time of the initial award to the time modification is sought. Once the petitioner meets the initial burden of demonstrating a basis for modification, the standards for determining the extent of disability are the same as in the initial proceeding.

The Court finds Employer has met the threshold requirement of showing a change in Claimant’s economic condition since the time of the initial award. The LS-200 and the tax documents show that Claimant has been working and earning wages as a truck driver. Two of Claimant’s treating physicians approved of all thirteen jobs that were listed as possible suitable alternative employment in the 2005 job market survey. Employer’s examining physician approved six jobs suggested in the survey. This new evidence could support a finding of a change in economic condition and so brings this claim within the scope of Section 22. Now I will consider all the relevant evidence of record to determine the extent of Claimant’s disability.

SUITABLE ALTERNATIVE EMPLOYMENT

Based upon the Claimant’s current earnings and the labor market survey completed by Ms. Seaford, Employer argues that Claimant is able to perform truck driving jobs and therefore his wage earning capacity has increased. Although Claimant admits he has engaged in truck driving employment, he argues that he would not be able to work without the help of his wife

and is incapable of participating in the truck driving business alone. Claimant acknowledges that he has a wage earning capacity equal to his current level of compensation.

The parties have stipulated that Claimant is unable to return to his previous position with Employer due to the work related injury Claimant suffered in 1988. The Employer now has the burden to establish suitable alternative employment. An employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981), rev'g 5 BRBS 418 (1977); Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327, 1330, 12 BRBS 660, 662 (9th Cir. 1980); Edwards v. Director, OWCP, 999 F.2d 1374 (9th Cir 1993), cert. denied, 511 U.S. 1031 (1994); Turner, 661 F.2d at 1041-1042.

Employer has failed to establish suitable alternative employment. Claimant is unable to fulfill the requirements of any of the thirteen positions suggested by the Employer. The positions as yard jockey for Dollar Tree Stores and QVC and the positions as route sales driver at Marva Maid, Mama Kayers Bakery, and Schwan's Home Services, Inc. require a high school diploma. Claimant does not have a high school diploma or a GED. Consequently, these five positions do not constitute suitable alternative employment for the Claimant.

The remaining jobs are all truck driver positions, either as the owner of the vehicle or as the driver of a company vehicle. Both the Claimant and his wife testified that he is unable to drive on his own. I find both their testimony to be credible. Claimant's testimony was consistent and honestly given. Claimant's wife, W.F., is also credible, and there are no inconsistencies between the testimony of Claimant and his wife. I have based my credibility findings on a review of the entire testimonial record and associated exhibits with regard for the reasonableness of the testimony in light of all record evidence and the demeanor of the witnesses.

The Court recognizes that the jobs were presented to three physicians and some have been found suitable for Claimant. However, Claimant has actually attempted to perform the duties of a truck driver and is unable to drive without his wife's assistance. The Court finds that Claimant is unable to hold a position as truck driver. Claimant credibly testified that he is only able to drive five to six hours a day and he must stop for breaks approximately every two and a half hours. Some days he is not able to drive at all. According to both Claimant and his wife, there are times when Claimant is not even able to accompany W.F. on trips. The driving records support their contentions; many of their trips are regional and require approximately ten hours of driving per day, the majority of which are driven by W.F. The truck driving positions with Rush Trucking, Swift Transportation Inc., U.S. Express, G & P Trucking Company, Allied Trailers and J. B. Hunt require regional driving, which Claimant is unable to do on his own. Consequently, I find that these truck driving jobs do not constitute suitable alternative employment for Claimant.

Furthermore, all the truck driving positions require climbing in and out of the truck, occasional bending, stooping or reaching overhead. Although the truck driving position at Neff

Rentals may not entail regional driving, it still requires all the physical demands associated with any truck driving position. Both Claimant and his wife testified that currently W.F. is doing most, if not all, of the labor necessary for truck driving, and that she does all that Claimant is not capable of doing.

Dr. Morales and Dr. Ross advised against any overhead activity. Dr. Morales stated in the medical records that Claimant is unable to work and Claimant testified that Dr. Morales advised him to stop truck driving and apply for Social Security.¹¹ Mr. DeMark concluded that Claimant is incapable of performing the duties necessary for any truck driving job. Mr. DeMark's conclusion is derived from his familiarity with truck driving positions, his meeting with Claimant and review of Claimant's background. Based on the Claimant's credible testimony, the testimony of his wife, the medical records and the opinion of Mr. DeMark, I find that Claimant is incapable of performing all the tasks necessary for truck driving.¹² Therefore, all the truck driving positions, including the job with Neff Rentals, fail to constitute suitable alternative employment.

ORDER

It is hereby ORDERED that Employer's request for modification is DENIED.

A

LARRY W. PRICE
Administrative Law Judge

¹¹ Dr. Morales approved all thirteen jobs suggested in the labor market survey; however this approval is inconsistent with many of Dr. Morales' comments in the medical records and is also contrary to Claimant's testimony. There is no explanation of this approval in the record. Claimant's testimony is supported by the overall opinions of both Dr. Morales and Dr. Baddar, and therefore I find the medical evidence supports the conclusion that Claimant is unable to fulfill the physical demands required by these truck driving positions.

¹² Mr. Demark's vocational report accurately portrays Claimant's skill level and educational background. His report is also based on many different resources including meetings with both Claimant and his wife. I therefore credited this report with more weight than the 2005 Labor Market Survey and testimony of Ms. Seaford. The 4th Circuit and the benefits review board have both held that additional evidentiary weight should be granted to Employer's vocational evidence due to Claimant's refusal to meet with Employer for the purpose of completion of the vocational report. Transtate Dredging v. Benefits Review Board, 731 F.2d 199 (4th Cir. 1984); Martiano v. Golden Marine Co., 23 BRBS 363 (1990); Dangerfield v. Todd Pacific Shipyards, 22 B.R.B.s. 104 (1988); Vogle v. Sealand Terminal, 17 B.R.B.S. 126 (1985); Villasenour v. Marine Maintenance Ind., 17 B.R.B.S. 99 (1985). Even with additional weight accorded to Employer's vocational evidence, Ms. Seaford's report is less credible than Mr. DeMark's report because Ms. Seaford inaccurately portrayed Claimant's educational level in the 2005 labor market survey. Claimant's job application to Employer, which is the sole basis for Ms. Seaford's inaccurate conclusion, does contain discrepancies with regard to Claimant's educational level. This uncertainty was not addressed by Ms. Seaford, and as a result of this mistake five positions suggested in the labor market survey were not suitable for Claimant.